Pendakwa Raya v Mohd Fuad bin Othman

HIGH COURT (MUAR) — CRIMINAL TRIAL NO 45–18 OF 1999
JEFFREY TAN J
6 NOVEMBER 2000

Criminal Procedure *— Sentence — Mitigating factors — Charge of possession of dangerous drug — Remorseful — Pleaded guilty — Saved court's time and inconvenience to witnesses — Whether to reduce sentence — Deterrent sentence*

The accused pleaded guilty to an alternative charge of possessing a dangerous drug, namely, cannabis, and committing an offence under s 6 of the Dangerous Drugs Act 1952. He admitted the following facts which were read out and explained to him: that a police party saw him with a black bag attempting to escape from a house, that he was apprehended and a caution was read to him, that he was questioned but refused to reveal the whereabouts of the black bag, that a search was conducted of the house and its surroundings, that his brother was arrested, that when the black bag was found, he was asked what the contents of the bag were and he replied that it was 'ganja', and that inside the bag three compressed blocks of plant material and a mobile phone and phone bill in the name of the accused were found. The police later released the accused's brother who had not participated in the crime. Being satisfied that the accused understood the nature and consequences of his plea, and admitted the alternative charge without qualification, his plea of guilt was accepted and a conviction was recorded. The accused's counsel mitigated for him, claiming that the accused was remorseful and had saved judicial time by pleading guilty. He also pleaded for a lenient sentence and asked that the sentence to commence from the date of the arrest.

Held:

(1) In deciding the appropriate sentence, the first and foremost consideration is the public interest; (R v Kenneth John Ball 35 Cr App R 164). If the court finds the accused guilty or if a plea of guilty has been recorded and accepted, the court shall pass sentence according to law. Nonetheless, in assessing sentence, all the circumstances of the offence should be considered (Low Oi Lin v R [1949] MLJ 210). Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence; (Lee Peng Kong v PP [1986] 2 CLJ 139) (see p 553C, E, H).

(2) The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused (PP v Loo Choon Fatt [1976] 2 MLJ 256). A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so (*PP v Khairuddin* [1982] 1 MLJ 331) (see pp 553H–554A).

(3) There are hardly any extenuating circumstances in the present case. On the other hand, the offence could only be considered most serious. After all, the accused was in possession of 1,143.9g of cannabis, a quantity which is heavy enough indeed many times over to attract the presumption of trafficking in a drug trafficking trial. The punishment must fit the instant crime and the sentence must reflect the gravity of the offence. Notwithstanding the undeniable fact that the accused had pleaded guilty and saved much judicial time, the sentence according to law cannot be lenient. Moreover, the accused is not a first offender. On balance, when all things — the interest of the public and the interest of the accused — are considered, the right and proper sentence is nine years' imprisonment, with effect from the date of arrest and ten strokes of the rotan (see p 554A–D).

[**Bahasa Malaysia summary**

Tertuduh telah membuat pengakuan bersalah terhadap satu pertuduhan alternatif memiliki dadah merbahaya, iaitu, kanabis, dan kerana satu kesalahan di bawah s 6 Akta Dadah Merbahaya 1952. Beliau mengaku terhadap fakta-fakta berikut yang telah dibaca dan diterangkan kepada beliau: bahawa satu pasukan polis telah melihat beliau dengan satu beg hitam cuba untuk melarikan diri daripada sebuah rumah, bahawa beliau telah ditangkap dan satu amaran telah dibacakan kepada beliau, bahawa beliau telah disoal tetapi enggan untuk mendedahkan di mana beg hitam itu berada, bahawa satu siasatan telah dijalankan di rumah tersebut dan sekitarnya, bahawa adik lelaki beliau telah ditangkap, bahawa apabila beg hitam tersebut tetlah dijumpai, beliau ditanya apakah kandungan beg tersebut dan beliau menjawab bahawa ia adalah 'ganja', dan bahawa di dalam beg tersebut tiga blok yang mampat dengan bahan tumbuhan dan satu telefon bimbit dan bil telefon atas nama tertuduh telah dijumpai. Polis kemudiannya telah membebaskan adik lelaki tertuduh yang tidak terlibat di dalam jenayah tersebut. Setelah berpuas hati bahawa tertuduh memahami sifat dan akibat pli beliau, dan mengaku terhadap pertuduhan alternatif tersebut tanpa syarat, pli bersalah beliau telah diterima dan satu sabitan telah direkodkan. Peguam tertuduh telah membuat mitigasi bagi pihak beliau, dengan menyatakan bahawa tertuduh telah menyesal dan telah menjimatkan masa mahkamah dengan membuat pengakuan bersalah. Beliau juga membuat pli untuk satu hukuman yang ringan dan bertanya agar hukuman dimulakan daripada tarikh tangkapan.

Diputuskan:

(1) Di dalam membuat keputusan untuk hukuman yang sesuai, pertimbangan yang utama sekali adalah kepentingan awam (*R v Kenneth John Ball* 35 Cr App R 164). Jika mahkamah mendapati

tertuduh bersalah atau jika pli bersalah telah direkod dan diterima, mahkamh hendaklah memberikan jukuman menurut undang-undang. Walau bagaimanapun, di dalam memberikan hukuman, semua keadaan kesalahan tersebut hendaklah dipertimbangkan; *Low Oi Lin v Rex* [1949] MLJ 210 diikut. Faktor-faktor mitigasi tidak boleh dikecualikan, walaupun kesalahan tersebut sepatutnya dikenakan hukuman pencegahan (*Lee Peng Kong v PP* [1986] 2 CLJ 139) (lihat ms 553C, E, H).

(2) Pendekatan yang betul adalah untuk mendapat satu imbangan, sejauhmana, antara kepentingan awam dan kepentingan tertuduh; *PP v Loo Choon Fatt* [1976] 2 MLJ 256 diikut. Mahkamah mempunyai budi bicara untuk bersikap sederhana dan belas kasihan dengan syarat wujud keadaan-keadaan peringan dan ia adalah demi kepentingan awam untuk berbuat demikian (*PP v Khairuddin* [1982] 1 MLJ 331) (lihat ms 553H–554A)

(3) Di dalam kes ini tidak langsung terdapat keadaan-keadaan peringan. Sebaliknya, kesalahan tersebut hanya boleh dikira sebagai paling serius. Lagipun, tertuduh memiliki 1,143.9g kanabis, sejumlah yang cukup banyak sekali untuk membawa kepada andaian mengedar di dalam satu perbicaraan pengedaran dadah. Hukuman mestilah setimpal dengan kes ini dan hukuman tersebut mestilah menggambarkan keseriusan kesalahan tersebut. Walaupun fakta yang tidak boleh dinafikan bahawa tertuduh telah mengaku bersalah dan menjimatkan masa mahkamah, hukuman menurut undang-undang tidak boleh ringan. Tambahan pula, tertuduh bukan pesalah untuk kali pertama. Atas imbangan, apabila semua perkara — kepentingan awam dan kepentingan tertuduh — dipertimbangkan, hukuman yang betul dan tepat adalah sembilan tahun penjara, bermula kuat kuasa daripada tarikh tangkapan dan sepuluh kali sebatan (lihat ms 554A–D).]

Notes

For cases in mitigating factors in sentencing, see 5 Mallal's Digest (4th Ed, 1997 Reissue) paras 2838–2855.

Cases referred to

Joginder Singh v PP [1984] 2 MLJ 133 (refd)
Lee Peng Kong v PP [1986] 2 CLJ 139 (folld)
Lee Yoke Choong v PP [1964] MLJ 138 (refd)
Low Oi Lin v Rex [1949] MLJ 210 (folld)
Mohamed Jusoh bin Abdullah & Anor v PP [1947] MLJ 130 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Khairuddin [1982] 1 MLJ 331 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

PP v Mohd Nooh bin Yusof & Ors Malall's Digest (4th Ed, l997 Revised) para 2918 (refd)
PR v Adam bin Mohamad Mallall's Digest (4th Ed, l997 Revised) para 2908 (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)
Regina v Murukaiyan Rasoo [1957] MLJ 26 (refd)
Regina v WN Hammar [1958] MLJ 4 (refd)
Yap Teng Chai v PP [1959] MLJ 205 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(l)(b)

Azman bin Ahmad for the Public Prosecutor.
Sazali bin Abdul Ghani (*Sajali & Aziz*) for the accused.

Jeffrey Tan J. : After the alternative charge (P3) was read and explained to him, the accused, when asked, pleaded guilty to the following offence:

> Bahawa kamu pada 3 Mac 1999 jam lebih kurang 2.00 pagi di bahagian tepi rumah No MTK 56, Batu 4, Parit Bunga, Muar, dalam Negeri Johor telah didapati memiliki dadah berbahaya iaitu 1,143.9g cannabis dan dengan kamu telah melakukan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(2) Akta yang sama.

And after the statement of facts of the case (P4) that the learned deputy public prosecutor ('DPP') (Azman bin Ahmad) tendered was read and explained to him, the accused admitted the following facts. A police party led by one Chief Inspector Mohd Nasri bin Omar, upon refusal of the occupants to open the door, broke into house No MTK 56, Batu 4, Parit Bunga, Muar and saw the accused with a black bag attempting to escape from the said house. The accused was apprehended. The caution under s 37(l)(b) of the Dangerous Drugs Act 1952 ('the Act') was read to the accused. The accused was questioned, but he refused to reveal the whereabouts of the black bag that was hitherto with him. A search was conducted of the house and its surroundings. The brother of the accused was arrested. The black bag was found about four feet beside the house. The accused was asked, 'Apakah benda yang ada di dalam beg hitam ini?'. The accused answered, 'Ganja'. Found inside the bag were: (i) a compressed block of plant material wrapped in plant leaves; (ii) two newsprint packages each containing a small compressed block of plant material; and (iii) a mobile phone registered in the name of the accused and a telephone bill in the name of the accused. Later, the police released the brother of the accused who had not participated in the crime.

Pertinent to the facts of the case, the learned DPP also tendered, amongst other exhibits: (i) the relevant police report — P5; (ii) the sketch plan and key of the house — P6 & P6K; (iii) 17 photographs — P7(1-17); (iv) the report of a government chemist with regard to his findings on the aforesaid plant material — P8; and (v) the plant material — P9(S), P10(S), P11(S), P12(S). The accused admitted all exhibits tendered.

Being satisfied that the accused understood the nature and consequences of his plea, and admitted, without qualification, to the alternative charge, and that the offence as admitted by the accused was disclosed from the admitted facts and exhibits of the case, the plea of guilt of the accused was accepted and a conviction was recorded.

Mr Sajali bin Abdul Ghani mitigated for the accused. He said that the accused, a single person of 30, is remorseful. He further said that the accused by pleading guilty has saved judicial time. He pleaded for a lenient sentence, and asked that the sentence to commence from the date of arrest.

The learned DPP said that the accused, in 1996, was convicted and fined RM2,000 for an offence under s 5 of the Act.

'In deciding the appropriate sentence … the first and foremost consideration is the public interest' (*R v Kenneth John Ball* 35 Cr App R 164, see also *Regina v Murukaiyan Rasoo* [1957] MLJ 26). 'If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law'. A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles' (*PP v Jafa bin Daud* [1981] 1 MLJ 315 at p 316 per Mohamed Azmi J, as he then was). 'The first and foremost consideration of punishment is the public interest. The object of punishing crime is .... also to deter others' (*Yap Teng Chai v PP* [1959] MLJ 205 at p 206; see also *Regina v WN Hammar* [1958] MLJ 4).

Nonetheless, in assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v Rex* [1949] MLJ 210). 'The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character.' (*Mohamed Jusoh bin Abdullah & Anor v PP* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsam Ed) Vol 9, para 365). 'Courts are duty bound to consider all these matters before deciding upon a suitable sentence' (*Joginder Singh v PP* [1984] 2 MLJ 133, per Ajaib Singh J (as he then was). The sentence must be one appropriate to the gravity of the offence (*Lee Yoke Choong v PP* [1964] MLJ 138). Accordingly, the sentence should reflect the seriousness of the offence (*PP v Khairuddin* [1982] 1 MLJ 331).

Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v PP* [1986] 2 CLJ 139). However, that is not to say that 'the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives' (*Regina v Murukaiyan Rasoo* [1957] MLJ 26). Public interest must not be relegated to the background. 'The correct approach is to strike a balance, so far as possible, between the interests of the public and the interests of the accused' (*PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 258 per Hashim Yeop A Sani J, as he then was; see also *PR v Adam bin Mohamad Mallall's Digest* (4th Ed, l997

Revised) para 2908 and *PP v Mohd Nooh bin Yusof & Ors Malall's Digest* (4th Ed, l997 Revised) para 2918). 'A court has the discretion to be lenient and merciful provided there are extenuating circumstances *and it is in the public interest to do so*' (*PP v Khairuddin*). (Emphasis added.)

But there are hardly any extenuating circumstances in the present case. On the other hand the offence could only be considered most serious. After all, the accused was in possession of 1,143.9g of cannabis, a quantity which is heavy enough indeed many times over to attract the presumption of trafficking in a drug trafficking trial. The punishment must fit the instant crime. And the sentence must reflect the gravity of the offence. Notwithstanding the undeniable fact that the accused has pleaded guilty and saved much judicial time, the sentence according to law cannot be lenient. Moreover, the accused is not a first offender. He had not learnt to stay away from dangerous drugs. On balance, when all things — the interest of the public and the interest of the accused — are considered, the right and proper sentence, and so it is accordingly the sentence of the court, is nine years' imprisonment, with effect from the date of arrest, and ten strokes of the rotan.

Order accordingly.

Reported by Wong Ee Lynn